

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 30, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-0764-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

VICTOR SPANBAUER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Richland County:
KENT C. HOUCK, Judge. *Reversed and cause remanded with directions.*

EICH, C.J.¹ Victor Spanbauer appeals from a judgment convicting him, as a repeater, of one theft and four controlled-substance violations. He was sentenced to two years in prison on each count, the sentences to run consecutively.

¹ This appeal is decided by a single judge pursuant to § 752.31(2)(f), STATS.

He raises a single argument on appeal: that the prosecutor did not establish his repeater status as required by law.

The State has not filed a brief, despite the fact that the Richland County district attorney's office was notified by this court on July 16, 1997, that its brief was overdue. No brief was filed, and no contact made by the district attorney with this court. On September 2, 1997, we issued an order to the district attorney and defense counsel stating that, because of the State's delinquency, "the appeal shall proceed to a decision based solely on the appellant's brief, and without further participation by the State."

It has long been the rule, in Wisconsin and elsewhere, that arguments and propositions advanced by an appellant are taken as confessed when the respondent—in this case the State of Wisconsin—does not undertake to refute them. *State ex rel. Sahagian v. Young*, 141 Wis.2d 495, 500, 415 N.W.2d 568, 570 (Ct. App. 1987). In this case, the Richland County district attorney could have saved both the defendant and this court (and its staff) considerable time and effort had he or she—apparently conceding that no plausible argument exists in support of affirmance—simply stipulated to a remand rather than ignoring our communications.

Based on the foregoing, we reverse the judgment of conviction and sentence insofar as it sentences Spanbauer as a repeater. At Spanbauer's request, we remand to the circuit court with directions to

enter an amended judgment of conviction which deletes all reference to the appellant being a repeat offender and which modifies the sentences to 4.5 months on Count 1, and 1 year each on Counts 2-5, with all sentences running consecutive for a total of 4 years 4.5 months imprisonment. The judgment should still grant 144 days of credit for time served.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.

